



**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 Church Street
L&C Annex 6th Floor
Nashville, TN 37243-1534**

March 10, 2008

Mr. Michael Hewgely – Registered Agent
Grant Properties, LLC
6305 Humphreys Boulevard, Suite 108
Memphis, Tennessee 38120

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7006 0810 0000 1061 7320**

Subject: DIRECTOR'S ORDER NO. WPC08-0030
 THE VILLAGES AT PORTER FARMS
 SHELBY COUNTY, TENNESSEE

Dear Mr. Hewgely:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

Corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact Mark Jordan at (615) 532-0675.

Sincerely,

Patrick N. Parker, Manager
Enforcement and Compliance Section

PNP:MAJ

cc: DWPC – EFO-Memphis
 DWPC – Compliance File
 OGC



**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 Church Street
L&C Annex 6th Floor
Nashville, TN 37243-1534**

March 10, 2008

Mr. William B. Yancey – Registered Agent
Yancey Brothers Construction, LLC
91 Peyton Parkway, Suite 103
Collierville, Tennessee 38017

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7006 0810 0000 1061 7313**

Subject: DIRECTOR'S ORDER NO. WPC08-0030
THE VILLAGES AT PORTER FARMS
SHELBY COUNTY, TENNESSEE

Dear Mr. Yancey:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

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Sincerely,

Patrick N. Parker, Manager
Enforcement and Compliance Section

PNP:MAJ

cc: DWPC – EFO-Memphis
DWPC – Compliance File
OGC

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
)	
GRANT PROPERTIES, LLC and)	DIVISION OF WATER
YANCEY BROTHERS CONSTRUCTION,)	POLLUTION CONTROL
LLC)	
)	
RESPONDENTS)	
)	CASE NUMBER WPC08-0030

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "division" and the "department" respectively).

II.

Grant Properties, LLC, (hereinafter Respondent Grant) is an active corporation licensed to conduct business in the state of Tennessee and is the owner/developer of The Villages at Porter Farms, a residential development in Shelby County (hereinafter the "site"). Service of process may be made on Respondent Grant through Michael Hewgley, Registered Agent, at 6305 Humphreys Boulevard, Suite 108, Memphis, Tennessee 38120.

III.

Yancey Brothers Construction, LLC, (hereinafter Respondent Yancey) is an active corporation licensed to conduct business in the state of Tennessee and is contracted by Respondent Grant to conduct construction activities at the site. Service of process may be made on Respondent Yancey through William B. Yancey, Registered Agent, at 91 Peyton Highway, Suite 103, Collierville, Tennessee 38017.

JURISDICTION

IV.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

V.

The Respondents are “persons” as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

VI.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

VII.

Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (hereinafter the “ARAP”) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VIII.

Nonconnah Creek and an unnamed wetland, described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

IX.

On October 30, 2006, an application for a General Aquatic Resource Alteration Permit for Utility Line Crossings (ARAP) was submitted to the Memphis Environmental Field Office (MEFO) by John Porter of Village Development, LLC (Village Development), then owner of the site, requesting written authorization for the installation of gravity sewer line crossings of meander wetlands in Phase 2 of the site. The division issued written authorization for these activities on October 31, 2006.

X.

On November 20, 2006, a NOI, SWPPP, and appropriate fee were submitted to the MEFO by Village Development, requesting coverage under the TNCGP for construction activities in Phase 2 of the site. Respondent Yancey was listed on the NOI as the primary contractor at the site. The division issued coverage under the TNCGP for these activities on December 11, 2006 and assigned tracking number TNR152708.

XI.

On December 8, 2006, the division's Natural Resources Section (NRS) received an application from Village Development, requesting the issuance of an Individual ARAP for the filling of 0.69 acres of jurisdictional wetlands on the site. The NRS issued an Individual ARAP for this activity on April 12, 2007, and assigned tracking number NRS06.408. This ARAP required compensatory mitigation by the creation of 2.76 acres of wetland along the flood plain of Nonconnah Creek on site.

XII.

On October 3, 2007, Respondent Grant submitted a NOI and SWPPP, indicating assumption of ownership of Phase 2, and a NOI, SWPPP, and appropriate fee requesting coverage under the TNCGP for construction activities in Phase 3 of the site. Respondent Yancey was listed on the NOI as the primary contractor at the site on both NOIs. The division issued coverage under the TNCGP for Phases 2 and 3 assigned tracking numbers TNR152708 and TNR152709, respectively, on October 17, 2007.

XIII.

On December 11, 2007, Respondent Grant submitted a NOI, SWPPP, and appropriate fee requesting coverage under the TNCGP for construction activities in Phase 4 of the site. Respondent Yancey was listed as primary contractor for Phase IV.

XIV.

On December 18, 2007, division personnel conducted an inspection in order to assess site conditions prior to issuance of TNCGP coverage for Phase 4. Based on Global Positioning System readings taken, division personnel determined that approximately 110 acres, including the area of Phase IV, had been cleared without phasing as required by the TNCGP. The entire area had been left bare and unstable. A sediment basin had been constructed on the southeast portion of Phase 2 of the site, but the basin did not have inlet and outlet structures and appeared to be receiving very little flow from the site. The SWPPP for Phase 2 indicated that an outlet was to be constructed from this basin to Nonconnah Creek, requiring written authorization under an appropriate ARAP. Division personnel noted no other Erosion Prevention and Sediment Control (EPSC) measures at the site. Nonconnah Creek was noted to be filled with sediment-laden water within and downstream of site, but was clear upstream of the disturbed areas. A

subsequent file review indicated that written authorization for the outlet structure had not been requested or issued and that Village Development had not submitted a Notice of Termination (NOT), removing responsibility for TNCGP compliance in Phase 2 of the site.

XV.

On January 11, 2008, the division issued correspondence to the Respondents and to Village Development detailing the violations noted during the December 18, 2007, inspection. Village Development was made aware that a NOT had not been submitted for Phase 2 and that compliance with the TNCGP was still shared with Respondent Grant. The Respondents and Village Development were instructed to attend a Compliance Review Meeting (CRM) at the MEFO on January 22, 2008.

XVI.

On January 14, 2008, Village Development submitted a NOT for Phase 2 of the site, certifying that Respondent Grant had been issued TNR152708 and that Village Development was no longer an operator at the site.

XVII.

On January 18, 2008, division personnel conducted a site inspection and noted that sediment laden water was flowing from the site into an old meander of Nonconnah Creek and eventually into Nonconnah Creek itself.

XVIII.

On January 23, 2008, the division sent correspondence to Village Development, acknowledging receipt of the NOT and stating that construction storm water discharges were no longer authorized under TNR152281.

XIX.

On January 22, 2008, the Respondents attended a CRM at the MEFO, in which the Respondents were instructed to implement the following actions:

- Immediately install a temporary sediment basin in Phase 3 at the downstream end of channel/wetland in order to prevent future discharges of sediment-laden water off-site and into Nonconnah Creek.
- On or before February 7, 2008, submit a revised NOI and SWPPP for Phase 3 showing the temporary basin and indicating the extent of additional, unauthorized disturbance that had occurred.
- Immediately stabilize the disturbed area to the east of Detention Basin 2 and all other areas where construction activities had temporarily or permanently ceased.
- Initiate the TNCGP phasing requirement for Phases 2 and 4 to ensure that no more than 50 of disturbance would occur at one time.
- On or before February 7, 2008, confirm whether NRS06.408 should remain with Village Development or should be transferred to Respondent Grant.
- Obtain an appropriate ARAP for the outfall structures to be installed on Nonconnah Creek.
- Continue to comply with the requirements of the TNCGP.

XX.

On January 25, 2008, the division sent correspondence to the Respondents summarizing the expectations and instructions of the January 22, 2008 CRM. Also on this date, the division issued coverage under the TNCGP to Respondent Grant for construction activities in Phase 4 of the site and assigned tracking number TNR152766.

XXI.

On February 1, 2008, Respondent Grant submitted an application requesting written authorization under an appropriate General ARAP for the installation of two outfall structures on Nonconnah Creek, and an amended NOI and SWPPP for Phase 3, as requested during the January 22, 2008, CRM. The amended NOI indicated an increase of the disturbed area from 12.76 acres to 18.61 acres. The division issued written authorization for the ARAP activities on February 4, 2008.

XXII.

On February 21, 2008, the division issued amended coverage for construction activities in Phase 3 under existing tracking number TNR152709, reflecting the increased disturbed acreage indicated on the amended NOI.

VIOLATIONS

XXIII.

By failing to comply with the terms and conditions of the TNCGP, the Respondents have violated T.C.A. §§ 69-3-108(b) and 114(b), which state in part:

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXIV.

By causing a condition of pollution in Nonconnah Creek, the Respondents have violated

T.C.A. Section 69-3-114(a), which states:

§ 69-3-114(a):

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an

unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XXV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondents:

1. The Respondents shall, within 7 days of receipt of this ORDER AND ASSESSMENT, establish effective EPSC measures such that sediment is not allowed to leave the site. These measures shall be chosen and installed in accordance with the Tennessee Erosion Control Handbook.
2. The Respondents shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondents shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the MEFO at Suite E-645 Perimeter Park, 2510 Mount Moriah Road, Memphis, Tennessee 38115, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
3. The Respondents shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.


4. Respondent Grant shall, within 14 days of receipt of this ORDER AND ASSESSMENT, confirm whether NRS06.408 should remain with Village Development, LLC or should be transferred to Responded Grant.
5. The Respondents shall pay a CIVIL PENALTY of TWENTY THREE THOUSAND FIVE HUNDRED DOLLARS (\$23,500.00) to the division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500.00).
 - b. If the Respondents fail to comply with Part XXV, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIVE THOUSAND DOLLARS (\$5,000.00), payable within 30 days of default.
 - c. If the Respondents fail to comply with Part XXV, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
 - d. If the Respondents fail to comply with Part XXV, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
 - e. If the Respondents fail to comply with Part XXV, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.

The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this ORDER AND ASSESSMENT. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER AND ASSESSMENT is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER AND ASSESSMENT will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 7th day of March 2008.



Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.